A **LEISURE FARM CORPORATION SDN BHD**

v.

KABUSHIKI KAISHA NGU & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[SUIT NO: 22NCC-1074-07-2012]
20 MAY 2014

C ***CONTRACT:*** *Damages - Specific performance - Damages in lieu of specific performance - Sale of shares - Specific performance rendered inappropriate due to third party interest being affected - Whether damages should be granted in lieu of specific performance*

D ***CONTRACT:*** *Formation - Sale and purchase of shares - Memorandum of understanding - Formal contract not executed - Whether binding contract arising - Existence of consideration, certainty of parties, certainty of price and certainty of property - Binding contract arising*

E ***CONTRACT:*** *Intention to create legal relations - Memorandum of understanding - Sale and purchase of shares - Formal contract not executed - Conduct of parties showing intention to create binding relations - Existence of consideration, certainty of parties, certainty of price and certainty of property - Binding contract arising*

F ***CONTRACT:*** *Specific performance - Sale and purchase of shares - Damages in lieu of specific performance - Sale of shares - Whether specific performance rendered inappropriate due to third party interest being affected - Damages granted in lieu of specific performance*

G ***TORT:*** *Conspiracy - Elements of - Conspiracy to injure and/or defraud - No evidence of predetermined collusion between defendants - Whether conspiracy established*

The second defendant was a company incorporated in Malaysia and its main asset was a piece of land ('the said land'). By a
H memorandum of understanding dated 8 December 2011 ('2011 MOU') the plaintiff and the first defendant agreed to negotiate for the potential sale and purchase of the entire issued shares of the second defendant ('the shares'). It was specifically provided in the said MOU that the terms therein were non-binding. The parties
I then engaged in active negotiations and due diligence were

conducted by the defendants. Subsequently, another memorandum was executed in Hong Kong ('the Hong Kong memorandum') where it was agreed that the first defendant will sell to the plaintiff the shares for USD25.3 million. The plaintiff's representatives then met the first defendant's representatives on 23 March 2012 in Singapore with the expectation that the sale and purchase agreement ('SPA') will be executed and 20% of the purchase price to be paid as agreed. However, the first defendant refused to execute the SPA and to accept the part payment of the consideration price. Instead new terms were indicated through the first defendant's new solicitors. The first defendant also requested for an increase of the consideration price to USD27 million. The increase was agreed to by the plaintiff on a goodwill basis. Unfortunately, the offer by the plaintiff was rejected by the first defendant as it was communicated to them 20 minutes after the deadline. Meanwhile, the third defendant entered into an option to purchase from the second defendant a part of the said land. The plaintiff thus commenced the present suit claiming, *inter alia*: (i) specific performance of the SPA originally to be executed on 23 March 2012 between the plaintiff and the first defendant for the sale and purchase of the shares for USD$25.3 million; (ii) damages for breach of contract; (iii) damages for conspiracy to injure and/or defraud; (iv) an order that the second defendant complete the transfer of the shares in accordance with the terms of the SPA originally to be executed on 23 March 2012; and (v) a declaration that the agreement between the second and third defendants was null and void. The pivotal issue to be decided was whether there was a concluded contract between the plaintiff and the first defendant. The plaintiff claimed that by attempting to sell part of the said land, the defendants had conspired to injure and defraud the plaintiff. The plaintiff further contended that the agreement between the second and third defendants was a sham and merely intended to scuttle the plaintiff's claim.

Held (allowing plaintiff's claim against first defendant and dismissing plaintiff's claim against second and third defendants):

(1) The conduct of the parties showed an intention to create a legal and binding relation. The Hong Kong MOU which was signed after the 2011 MOU did not state specifically at all that the terms were not binding. Item 3 of the Hong Kong MOU specifically provided that the final price of the transaction was USD25.3 million and that there would be no

more negotiations on the price. The plaintiff was at all material times ready to proceed with the execution of the SPA. (para 78)

(2) There was a meeting of minds between the parties. There was consideration, certainty of parties, certainty of the price and certainty of property. Although the terms and conditions of the agreement were not embodied in a formal contract, a valid and binding agreement had been concluded between the parties. There was not only *consensus ad idem* between the parties but the necessary *animus contrahendi*. The MOUs executed between the plaintiff and the first defendant were a concluded and binding contract between the parties; *Ho Kam Phaw v. Fam Sin Nin* (refd). (para 77)

(3) The parties had, until the eve of the scheduled signing date, proceeded on the understanding and basis that the SPA will be signed on 23 March 2012. The last minute change of solicitor showed the first defendant's bad faith in the whole transaction. (para 88)

(4) In the particular circumstances surrounding the transaction, the plaintiff was entitled to an order for compensation to be recovered from the first and second defendants for the first defendant's breach of the terms of the MOU. However, due to the existence of the agreement with the third defendant, specific performance may not be appropriate. The compensation recoverable by the plaintiff from the first defendant *in lieu* of an order of specific performance was RM841,691.94 being expenditure incurred. (para 95)

(5) In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff. Where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be conspiracy. If the predominant purpose is for the self interest or protection of the defendants, it is not an unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss. Therefore, for conspiracy to take place, there must be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. There must also be a co-existence of an agreement with an overt act causing damage to the plaintiffs; *Yap JH v. Tan Sri Loh Boon Siew & Ors* (refd). (para 100)

(6) The evidence adduced was insufficient to constitute an act of conspiracy. There was no evidence to show pre-determined collusion between the defendants. There was no evidence to suggest that there was any conspiracy by the first and second defendant with the third defendant to defraud the plaintiff. (para 105)

(7) From the evidence adduced, the third defendant was keen to purchase and develop the land. The third defendant's transaction with the first defendant was not a sham transaction. There were proper negotiations and considerations between the parties. (para 109)

Case(s) referred to:

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Crofter Hand Woven Harris Tweed Co Ltd v. Veitch [1942] AC 435 ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Ho Kam Phaw v. Fam Sin Nin [2000] 3 CLJ 1 FC ***(refd)***

Karumalay Vanniyan & Anor v. Ananthan Rethinam [2005] 2 CLJ 429 CA ***(refd)***

Lim Chia Min v. Chean Sang Ngeow & Anor [1997] 2 CLJ 337 FC ***(refd)***

Lonrho Plc v. Fayed and Others [1991] 3 All ER 303 ***(refd)***

MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd [2010] 1 CLJ 36 CA ***(refd)***

Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***

Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia [2000] 3 CLJ 313 CA ***(refd)***

Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(refd)***

Legislation referred to:

Specific Relief Act 1950, ss. 18, 23(b)

For the plaintiff/appellant - Lim Koon Huan (Jason Teoh & Nicholas Lai with him); M/s Skrine

For the 1st defendant - Ong Chee Kwan (Chew Pei Ying with her); M/s Christopher & Lee Ong

For the 2nd defendant - Ang Hean Leng (Tan Chia Wen with her); M/s Lee Hishammuddin Allen & Gledhill
For 3rd defendant - Mathew Thomas Philip (Tan Jee Tjun & Joanne Chua Tsu Fae with him); M/s Thomas Philip

Reported by Amutha Suppayah

JUDGMENT

Hasnah Mohammed Hashim J:

The Plaintiff's Claim

As Against The First Defendants

[1] Specific performance of the sale and purchase agreement originally to be executed on 23 March 2012 between the plaintiff and first defendant for the sale and purchase of the entire issued shares of the second defendant for the consideration price of USD25.3 million within seven days from the date of this order;

Further and/or in the alternative damages for the sum of RM101,224,194.94 for the first defendant's breach of contract *in lieu* of specific performance;

Further and/or in the alternative damages in addition to specific performance;

Interest at the rate of 8% per annum on any sums awarded by this court to the plaintiff from the date of this statement of claim until the date of full payment;

Damages for conspiracy to injure and/or defraud to be assessed; and

Costs.

As Against The Second Defendants

[2] Consequently, an order that the officers and the company secretary of the second defendant shall do everything necessary to complete the transfer of the entire issued shares of the second defendant in accordance with the terms of the sale and purchase agreement originally to be executed on 23 March 2012 between the plaintiff and first defendant;

Damages for conspiracy to injure and/or defraud to be assessed; and

Costs.

As Against The Third Defendant

[3] Damages for conspiracy to injure and/or defraud to be assessed; and

Costs.

As Against The Second And Third Defendants

[4] A declaration that the third defendant's SPA is null and void; and

Costs.

As Against The First and Second Defendants

[5] In the event the third defendant's SPA is not held as null and void, an alternative order requiring the directors of the first and second defendants as at 4 April 2012 to bear any loss or damage suffered by the third defendant and/or indemnify the plaintiff in relation to the non-compliance and/or performance of the third defendant's SPA as at 14 March 2013; and

Costs.

Such further or other reliefs as this Honourable Court deems fit and proper to grant.

Facts

[6] The plaintiff is a company registered in Malaysia. The first defendant is a company incorporated in Japan. The second defendant is a company incorporated in Malaysia and operates a 36 holes golf course together with a club house as well as managing the membership of the said golf course resort known as Poresia Country Club. The main asset of the second defendant is a piece of land held under,

(a) GRN 333802, Lot 74596 Mukim Pulai;

(b) HSD 195059, PTD 59409 and PTD 59410 Mukim Pulai;

(b) GRN 333816, Lot 74593 Mukim Pulai;

(c) GRN 333817, Lot 74594 Mukim Pulai; and

(e) GRN 333818, Lot 74595 Mukim Pulai.

("the said land").

[7] The third defendant, a company incorporated in Malaysia, entered into an option to purchase from the second defendant a part of its land (HS(D) 195059, PTD 59410 and PTD 59409, in the Mukim of Pulai district of Johor Bahru) measuring approximately 166 acres.

Memorandum Of Understanding

[8] By a memorandum of understanding dated 8 December 2011 ("2011 MOU") the plaintiff and the first defendant agreed to negotiate for the potential sale and purchase of the entire issued shares of the second defendant. It was specifically provided in the said MOU that the terms therein are non-binding. For the purpose of the MOU both the parties were represented by their respective solicitors. The parties then engaged in active negotiations and due diligence were conducted by the defendants in Japan, Singapore and Malaysia. Mr Sugiki was at the material time the president as well as the representative director of the first defendant and the director of the second defendant.

The Hong Kong Memorandum

[9] Subsequently, the three men met yet again in Hong Kong on 16 March 2012, Lee Heng Suang and Mr Sugiki (president of the first defendant) executed a memorandum in Hong Kong ("the Hong Kong Memorandum") where it was agreed that the first defendant will sell to the plaintiff who agreed to purchase the entire issued shares of the second defendant for the consideration price of USD25.3 million (share sale transaction).

[10] The terms of the Hong Kong Memorandum *inter alia*, are as follows:

(i) The consideration price for the transaction shall be USD25.3 million and that there shall be no further negotiation on the consideration price;

(ii) A sale and purchase agreement (SPA) of the entire issued shares of Poresia shall be executed on 23 March 2012 incorporating the terms in the Hong Kong Memorandum; and

(ii) The plaintiff shall pay 20% of the USD25.3 million consideration price to the first defendant at the time of the signing of the SPA agreement on 23 March 2012.

[11] Parties then proceeded to engage in further active negotiations. *Via* an e-mail dated 19 March 2012, the first defendant's solicitors notified that the first defendant was not prepared to proceed with the SPA if the SPA was not executed on 23 March 2012. The plaintiff's representatives then met the first defendant's representatives on 23 March 2012 in Singapore with the expectation that the SPA will be executed and 20% of the purchase price to be paid as agreed. However, the first defendant refused to execute the SPA and to accept the bank draft of the 20% as part payment of the consideration price. Instead new terms were indicated through the first defendant's new solicitors, Mr Yap Wai Ming of Messrs Stamford Law Corporation. The terms are as follows:

(i) That the bank draft for the 20% part payment be made in favour of the Resort Poresia (Singapore) Pte Ltd; and

(ii) To negotiate new terms.

[12] The first defendant also requested for an increase of the consideration price to USD27 million. The increase was agreed to by the plaintiff on a goodwill basis. Unfortunately the offer by the plaintiff was rejected by the first defendant as it was communicated to them 20 minutes after the deadline.

[13] The plaintiff through its solicitors issued a demand that the share sale transaction proceed as agreed. However, the first defendant failed, refused and/or neglected to do so. The plaintiff filed the suit claiming *inter alia*, that a binding agreement between the plaintiff and the first defendant concluded a sale and purchase of the second defendant's entire issued share and by extension, the said land owned by the second defendant.

[14] To protect its interest on the land, the plaintiff entered a private caveat on 4 June 2012 and obtained an injunction on 19 September 2012 restricting the first and second defendants of any dealings with the land and any initiation proceedings for the removal of the caveat. In spite of having notice of the plaintiff's interest, the second defendant entered into an option to purchase with the third defendant for the sale and purchase of a portion of

A the land. On 11 September 2012, the second defendant and the third defendant entered into a sale and purchase agreement right before the injunction became enforceable.

[15] A sum of RM7,840,800 was paid by the third defendant
B into the second defendant's bank accounts being 10% of the purchase price as a deposit to the sale and purchase agreement. Part of the said sum was deposited into a Malayan Banking Berhad account and the rest into the second defendant's account.

[16] One of the terms of the SPA is a condition precedent
C requiring the second defendant to procure the removal of the caveat within 24 months of the SPA failing which the second defendant will be required to refund the deposit and all monies paid under the SPA including reimbursable expenses and interest.

D **[17]** As the plaintiff is seeking specific performance of the sale and purchase of the entered issued shares of the second defendant, the condition precedent is significant as it would mean in the event the plaintiff succeeds in the claim, it would have to comply with the terms of the SPA.

E

[18] The sum of RM7,840,800 was banked into the second defendant's accounts as follows:

(i) RM815,443.20 was banked into Malayan Banking Berhad
F Account No. 001011272396 Johor Bahru; and

(ii) RM3,496,996.80 and RM2,025,356.80 and RM1,503,003.20 paid into the second defendant's other bank accounts.

Evaluation Of Evidence And Findings

G

Whether The MOU Executed Between The Plaintiff And The First Defendant Is A Concluded And Binding Contract

[19] The thrust of the plaintiff's case is that there is a valid, binding and enforceable contract between the parties by the terms
H of the MOU to enter into a formal sale and purchase agreement. The pivotal issue to be decided is whether there is a concluded contract between the plaintiff and the first defendant.

[20] Siti Norma Yaakob JCA (as Her Ladyship then was) in the
I case of *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact ... We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued ... .

The Evidence Of PW1

[21] Mr Kameda Sakae ("PW1") is a senior adviser with Itochu Hong Kong Ltd. Mr Kameda's role in the transaction was to act as the intermediary between the parties to facilitate in the negotiations as Mr Sugiki cannot read or understand English.

[22] In his witness statement, he told the court that he was approached by the plaintiff's representative sometime in 2009 to find out from the owner of the golf course, Mr Sugiki, whether the golf course was available for sale. PW1 was informed by Mr Sugiki that he was interested in selling the golf course. Mr Sugiki then made a proposal to the plaintiff to purchase the entire issued shares of the company that owns the land. This led to the meeting held on 18 November 2009 where Mr Kameda prepared a draft MOU signed by both parties on 19 November 2009. The MOU reads as follows:

> **Memorandum Of Understanding**
>
> This memorandum is to confirm matters discussed at a meeting held on November 18, 2009 at a meeting room at Sun Hung Kai Financial Group located at 12/F CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong between Mr. Kunihiko Sugiki (Party A) and Mr. Lee Seng Huang (Party B) in regard to the sale and purchase of Poresia Country Club, a golf course at Johor Bahru in Malaysia (the Golf Course). This memorandum is not legally binding.
>
> Mr. K. Makita and Mr. S. Kameda accompanied the meeting.
>
> 1. The 1st Defendant, the potential seller of the Golf Course, agreed to proceed with further discussions on condition that the existing golf club members' right to play at the Golf

A Course is protected for three years after the sale and purchase transaction is completed. Party B agreed to this point.

2. The Plaintiff, potential buyer of the Golf Course, agreed to proceed with further discussions provided that some basic
B points of concern can be clarified, such as (A) Satisfaction with Membership Agreement and the legal and actual membership position after the purchase, (B) Disclosure of financial statement, such as Profit and Loss Statement, Balance sheet, Cash Flow, to clarify if any problem exist,
C (C) Corporate Structure of the Golf Course and Any other liability, (D) Physical Condition of the Golf Course. The 1st Defendant agreed to clarify those points.

3. The 1st Defendant agreed to ask his accounting firm, Ernst & Young, to disclose information related to the afore
D mentioned 2 and the Plaintiff agreed to the same.

4. The 1st Defendant agreed to ask his son, Mr. Daigo SUGIKI, to disclose information requested by the Plaintiff to his staff Mr. Ronn and Mr. Lai Meng.

E 5. The 1st Defendant and the Plaintiff agreed that before the 1st Defendant disclose any information, the Earnest Money, to show good and serious intention of the Plaintiff, will be deposited at a law firm to be decided later by the Plaintiff. The amount will be 10% of the 1st Defendant's desired deal price of Japanese Yen 2,000 million.

F

... sgd ...	... sgd ...
Mr. Kunihiko Sugiki	Mr. Lee Seng Huang
Chairman, Liberty Co., Ltd.	Executive Chairman
Tokyo Japan	Mulpha International Bhd.
G	Malaysia.

[23] For the benefit of Mr Sugiki, PW1 had also prepared a Japanese translation of the aforesaid MOU. The transaction was eventually aborted. However, Mr Lee Seng Huang (PW5), the
H Executive Chairman of Mulpha International Berhad (Mulpha) as the representative of the plaintiff, continued having further discussions and meetings in relation to the shares and golf course with Mr Sugiki. The parties subsequently executed another MOU dated 8 December 2011 (2011 MOU):

I

Memorandum Of Understanding

The Parties (as defined below) have entered into this non-binding memorandum of understanding ("MOU") on this 8th day December 2011 ("Effective Date") for the purpose of describing for negotiation purposes only, the key terms of a potential purchase by Leisure Farm Corporation Sdn. Bhd. ("LF"). This MOU does not constitute an offer or commitment by the Parties hereto and is intended to serve as a basis for Definitive Agreement only. The terms and conditions stated in this MOU are not intended to be and shall not constitute legally binding obligations unless specifically provided for herein.

Sr. No.	Head	Particulars
1.	Purchaser	LEISURE FARM CORPORATION SDN BHD (109759-U) (OR ITS NOMINEE) OF 17, Jalan Semangat, 46100 Petaling Jaya, Selangor Darul Ehsan.
2.	Vendor	DAI-ICHI SHOKAI CO, LTD.
3.	Subject-Matter	All the shares of Resort Poresia Berhad who is the owner of Poresia Country Club located at Tanjung Kupang, Gelang Patah Johor Bahru (including the Land duly registered free from encumbrances and all movables assets) with 1,248 active members, 1,522 sleeping members, 2,883 cancelled members and 262 Term members. The figure is subject to fluctuation of +/- 2%. Ordinary members are granted license to use the facilities of the Club and 262 Term members which term shall expire within the course of 2012. The Purchaser will take over current members and existing employees on existing terms excluding any bonuses, gratuities, pensions or any other payments for long service accrued or accruing in favour of or payable to the employees of Poresia Country Club.
4.	Parties	The Purchaser and the Vendor are jointly referred to as the "Parties" and individually referred to as the "Party".

5.	Transaction	Subject to satisfactory due diligence to be conducted by the Purchaser from the date of this MOU and the Definitive Agreement to be executed by 28th December 2011. The consideration is US$27 million paid in the following manner: (a) 10% of the Purchase Price shall be paid and held by Vendor's Solicitors as stakeholder upon the signing of the Definitive Agreements; and (b) Balance 90% of the Purchase Price shall be paid by the Purchaser to the Vendor on Completion (to take place on or before last day of February 2012) in US Dollar in Singapore or Hong Kong as the Vendor may direct in writing prior to Completion. Consideration is determined in accordance with Financial Statement of Resort Poresia Berhad as at 31.03.2011 and no material change in its financial position has since occurred. Payment is subject to Bank Negara Malaysia's guidelines and approval.
6.	Definitive Agreement	The Parties shall negotiate and finalize, based on the terms contained in this MOU, in good faith, the terms conditions of the necessary legally binding agreement ("Definitive Agreement").
7.	Conditions Precedent	Closing of the Transaction shall be subject to the fulfillment of the condition precedents to be set out in the Definitive Agreement to the satisfaction of the Parties, and which shall include receipt of all corporate, regulatory and third party approvals including lender consents, if required and necessary and the Closing/ Completion shall take place on or before the last day of February 2012.
8.	Closing/ Completion Date	The Closing/Completion shall occur as soon as reasonably practicable ("Closing") but in any event shall not be later than the last day of February 2012.

9.	Representation and Warranties	Definitive Agreement shall contain customary representations and warranties for the sale of company shares.
10.	Indemnities	The Definitive Agreement shall set out provision for indemnifying the Purchaser from any third party claims and/or losses suffered by the Purchaser due to breach of representations and warranties.
11.	Confidentiality	The term and conditions described in this MOU including its existence and any or all information exchanged to enable the conclusion of Definitive Agreement shall be confidential information and shall not be disclosed by any Party to any third party without the prior written consent of the other Parties at all times and this covenant shall survive the validity of this MOU.
12.	Fees and Expenses	Each Party shall bear its own costs in connection with this MOU and the Definitive Agreement.
13.	Governing Law, Dispute Resolution and Arbitration	The Definitive Agreement shall be governed by Malaysia Law. All disputes hereunder or pursuant to the Definitive Agreement will be referred to arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre, 2007 and shall be held in Singapore.
14.	Binding Provisions	Each of the Parties agree that other than Clause 11 (Confidentiality), 12 (Fees and Expenses), 13 (Governing Law, Dispute Resolution and Arbitration) and 14 (Binding Provisions) which are binding provisions and are enforceable against the Parties from the Effective Date including enforcement by obtaining specific performance of the terms thereof, this MOU is non-binding in nature and is subject to the execution of Definitive Agreement between the Parties within the last week of December 2011.

.. sgd ..	... sgd ...
by	by
For and on behalf of the Vendor Name: Kunihiko Sugiki Designation: President	For and on behalf of the Purchaser Name: Ronn W Yong Designation: Deputy Chief Executive Officer
Date: 09.12.2011	Date:

[24] Following the said MOU the parties met yet again in Hong Kong on 15 March 2012 to further discuss the terms of the sale and purchase of the shares of the second defendant. By this MOU the parties scheduled the signing of agreement to be on 23 March 2012. Mr Lee and Mr Sugiki signed another MOU dated 16 March 2012 ("the Hong Kong MOU"):

MEMORANDUM

Representatives of Purchaser and Vendor of Poresia Golf Club located at Johor, Malaysia (hereinafter refer to as Poresia) agreed following terms and conditions to be incorporated into the Definitive Purchase and sell Agreement (hereinafter refer to as Agreement).

1. Number of Members of Poresia are Active Members 1,355, Sleeping Members 1,531, Cancelled Members 2,876 and Un-Activated members 481. Eliminating 481, total numbers is not more than 5,800. If the number increase more than 5,800, Vendor pay RM10,000 per one member.

   Vendor guarantees there is no more Un-activated member than 481.

2. Offset of MR7.3 million of amount due from Poresia Singapore and MR3.8 million of bank borrowing at Poresia. Purchaser agreed to write off MR7.3 million. Vendor agreed to discount the selling price to the amount of next item 3 as the final price of the transaction. Vendor agreed that in further claim, after the signing of the Agreement, from Mr. Sugiki and his company to Poresia. Vendor guarantees there is no more bank borrowing other than stated in the Financial Report, ie, not more than MR3.85 million. If more than MR3.8 million is existed at completion, the excess will be adjusted from the Vendor must not incur more liabilities until completion actual or contingent.

3. Final price of the transaction is US$25.3 million. No more negotiation on the price.

4. Signing date of the Agreement is March 23, 2012.

5. Down payment of 20% of the final price from the purchaser to vendor will be made at the time of signing of the Agreement. The Purchaser will pay the balance of 80% within one month from the signing date of the Agreement, subject to fulfillment of all completion conditions. Deposit of 20% to be released to Vendor subject to buyer having sufficient security, eg, Land Certificate of 9 holes of Poresia.

Representative of Purchaser Representative of Vendor Attested by

... sgd ... ... sgd ... ... sgd ...

Mr. Lee Seng Huang Mr. K. Sugiki Mr. S. Kameda.

[25] PW1 was present at the meetings that took place between the plaintiff's representative and Mr Sugiki. PW1 was the translator for Mr Sugiki and prepared the MOU in English as well as in the Japanese. In his witness statement, PW1 stated that Mr Sugiki did not show any apprehension or raised any concerns when he signed the Hong Kong MOU. The terms were explained in Japanese to Mr Sugiki by PW1. According to PW1, based on the discussions and negotiations that took place between the parties, it was "... obvious that parties intended to be bound, there was no provision or even the need to state that the Hong Kong Memorandum was not binding ...". He further gave evidence that if the parties were not in agreement on the salient terms they would not have agreed to fix a specific date for executing the agreement.

[26] The main terms of the Hong Kong MOU are as follows:

(i) The consideration price for the transaction is USD25.3 million;

(ii) No further negotiation on the consideration price;

(iii) The parties to execute the sale and purchase agreement (SPA) and incorporate the terms as stated in the Hong Kong MOU;

(iv) The plaintiff to pay 20% down payment of the USD25.3 million upon signing of the SPA;

(v) The proposed date of signing the SPA was 23 March 2012; and

(vi) The balance of the consideration shall be paid one month after the execution of the SPA.

[27] PW1 confirmed during cross-examination that the subject matter of the negotiation is clear that it included the sale of the land ie, the golf course,

> Q: Do you remember what is Mr. Sugiki's objective for asking the meeting in Hong Kong?
>
> A: My understanding is Mr. Sugiki wanted to materialize the transaction. He wanted to sell the property, he wanted to sell the golf course.

[28] There was a change of heart by Mr Sugiki, who then refused to sign the SPA on the date as agreed in the Hong Kong MOU. The SPA was targeted to be executed by the parties on 23 March 2012 as agreed by the Hong Kong MOU. By an e-mail dated 19 March 2012, 4.53pm, Mr Sugiki sent to his solicitor based in Singapore, David Ong and the plaintiff's solicitor, Mr SC Teh, the draft share purchase agreement incorporating the terms of the MOU as agreed.

[29] The 2011 MOU described the subject matter as "All the shares in Poresia Berhad, who is the owner of Poresia Country Club ... (including the land duly registered free from encumbrances and all movable assets) with 1,248 active members, 1522 sleeping members, 2,883 cancelled members and 262 Term members." In the aforesaid draft agreement 'land' is defined as the " ... the land owned by the company and on which the club is situated."

[30] Clause 2.3.2 of the said draft further provides:

> (a) upon execution of this Agreement, the Deposit shall be paid directly to the Vendor, provided that the Purchaser acquires sufficient security and guarantee through, *Inter alia*, production of Land Certificate of the 9-hole golf course of the Club.
>
> (b) subject to the fulfillment of the Conditions Precedent, the sum of US Dollars Twenty Million Two Hundred and Forty Thousand (USD 20,240,000) only (the "Balance Purchase Price") shall paid by the Purchaser to the Vendor in Singapore on Completion Date.

[31] The solicitors of the plaintiff and first defendant vetted as well as proposed amendments and exchanged comments. The preparation of the draft continued even when a new solicitor was appointed by Mr Sugiki. During the rigorous discussions and amendments the shares and the golf course as well as the price had always remained as the core of the negotiations.

[32] In his WS, PW1 told the court that after the aborted execution of the SPA on 23 March 2012, he had communicated with Mr Sugiki *via* telephone as well as by e-mails. By an e-mail dated 8 November 2012 (translated by PW1) Mr Sugiki confirmed that he intended to sell the land and the membership,

> From: Kameda<sk@uaf.com.hk>
>
> Sent: Thursday, November 08, 2012 4:07 PM
>
> To: 'Lee Seng Huang'; 'Susan Chan'
>
> Cc: 'HKG KAMEDA Sakae'
>
> Subject: Response from Mr. Sugiki (Original Japanese Language mail attached)
>
> Dear Mr. Lee Seng Huang,
>
> Dear Ms. Susan Chan,
>
> I am informing you about Mr. Sugiki's response I received today Nov. 8th, after I sent him two mails on Nov. 2 and Nov. 7.
>
> I had one telephone conversation on Nov. 7 before I sent the second mail.
>
> In short, I advised him that it must be better not to go to the court and settle the deal peacefully at the outside court. Otherwise Mr. Sugiki has to spend many years to see the court judgment. Nothing is good to go to the court.
>
> Mr. Sugiki said following in his mail: (The message is written in the title column.) Qte
>
> There were many things on the way to here. Now I can confer (with the party) (about the Poresia Deal), if it (the deal) is (a deal of) sale and purchase of the land and building, member included, price is three billion Japanese yen (or Japanese Yen 3,000 million).
>
> If you compare the market price at nearby location, I think that is cheap.

Give me answer. Sale and purchase of the share (or stock) is not considered.

Best regards,

Unqte

For your better understanding, I am sending another mail in which I attach his mail in Japanese. I don't know your side can receive it or not.

Best,

Kameda (F.Y.I.: The price agreed on March 16, 2012 was US$25.3 JY3,000 million divided by 80 (US$1=80) is US$37.5 million.).

[33] PW1 subsequently sent another e-mail dated 10 November 2012 enquiring the reasons for the change of terms in particular the sale price. Mr Sugiki replied in an e-mail dated 13 November 2012,

From: Kameda<sk@uaf.com.hk>
Sent: Tuesday, November 13, 2012 4:50 PM
To: 'Lee Seng Huang'
Cc: 'Susan Chan'; 'HKG KAMEDA Sakae'
Subject: Mr. Sugiki's Mail (US$40M) of Nov. 13, 2012

Mr. Lee Seng Huang,

A response mails from Mr. Sugiki came in this afternoon.

Qte

(I) understand the proposal. But (US)$30 million is not accepted. If it is (US)$40 million, I will take it.

It is land and building with members. It is cheaper than market value of nearby locations.

I can work for Surveyor's Report (if you wish)!

Let us go for the fair deal.

Unqte

He once requested JPY3,000 million which is about US$37.5 million in his mail of Nov. 8, 2012.

Today he came back with US$40 million.

Mr. Lee Seng Huang will you say unless Mr. Sugiki takes US$30 million, you have no intention to go for the "Peaceful Settlement" at all? Unless there will be no "Peaceful Settlement", there will only way at the court will be left for him and he will never know when he will have money in his hand.

Or something else?

I need your advice how to reply to his mail.

Best,

Kameda.

[34] PW1 gave evidence through a translator in Japanese, however, I am of the view that his evidence was clear and certain. I find him to be a credible witness.

The Evidence Of PW5

[35] PW5, Mr Lee Seng Huang is the Executive Chairman of Mulpha International Berhad (Mulpha). The plaintiff is a wholly owned subsidiary of Mulpha. PW5 told the court that the plaintiff had contacted Mr Kameda requesting him to get in touch with the owner of Resort Poresia as they heard that the golf course was on sale. The golf course is located in the middle of the plaintiff's development known as Leisure Farm Resort Residence in Johor. Resort Poresia is owned by Kabushiki Kaisha Ngu (KK Ngu) which is also owned by Mr Sugiki. PW5 had sought the assistance of Mr Kameda, a long time family acquaintance to assist in the negotiations as Mr Sugiki is not fluent in the English language. It was through Mr Kameda that PW5 was informed that Mr Sugiki wanted to sell the golf course and suggested that the plaintiff purchased the entire issued shares of the second defendant. He further explained that the 2011 MOU identified "Dai-ichi Shokai Co Ltd" as the Vendor (former name of KK Ngu).

[36] PW5 confirmed that active negotiations took place between the parties that eventually culminated into the parties executing the Hong Kong MOU. PW5 also stated in his witness statement that Mr SC Teh (PW2) from Messrs SC Teh & Azura was engaged to undertake the legal due diligence and Messrs Ernst & Young, the financial due diligence. The SPA was not executed on the date stipulated, 23 March 2012:

> ... I was informed by Mr. Lai Meng that the SPA was brought down to Singapore and Bank Draft for 20% down payment of the consideration price of USD25.3 million amounting to USD 5.06 million was presented to Mr. Sugiki by our representatives led by Mr. Yong Wan Seong on 23.3.2012. We were ready to execute the SPA but I was made to understand that KK Ngu was not ready to sign the SPA as they changed solicitors at the last minute and thus did not execute the SPA and Mr. Sugiki rejected the Bank Draft.

[37] Mr David Ong, (the solicitor of the first defendant) had sent an e-mail dated 19 March 2012 at 12.26pm,

> With respect to the proposed transaction, we have been instructed to inform your clients that if the SPA cannot be concluded and signed by the 23rd March 2012, the proposed transaction shall be aborted and our client is not prepared to proceed before 23.3.2012.
>
> We therefore look forward to your draft which should incorporate the latest terms by parties in writing by way of MOU when they last met.

[38] By an e-mail dated 26 March 2012, Mr Yap Wai Ming (the newly appointed solicitor of the first defendant) raised the following seven issues:

(i) The first defendant wanted commission under the collection agreement between Resort Poresia and Resort Poresia Pte. Ltd. to increase from 35% to 50%;

(ii) The first defendant wanted price to be paid to Resort Poresia Pte Ltd instead of first defendant;

(iii) The first defendant wanted a minimum limit of US$100,000 before a claim can be made by the plaintiff should there be a breach of warranty by the first defendant;

(iv) The first defendant wanted a notice of any claim to be made on or within 12 months of completion instead of the plaintiff's initial proposed period of three years;

(v) The first defendant wanted the plaintiff to pay quit rent and property assessment up to 2012;

(vi) The first defendant wanted to draft a letter of disclosure and have suggested a format; and

(vii) The first defendant wanted all tax warranties apart from the taxation claim disclosed by the first defendant to be removed.

[39] The lawyers of both the plaintiff and the first defendant had further discussions with regards to the seven issues raised and ultimately the plaintiff acceded to the seven issues and an amended draft of the SPA was given to Mr Sugiki's solicitors (Re: pp. 179-247 C2). The first defendant's solicitors however raised further issues in particular to the purchase price to be revised to USD27 million. The plaintiff were willing to accede to the new proposal but the first defendant through its solicitors rejected the offer by the plaintiff as the plaintiff was 34 minutes too late from accepting the offer to revise the purchase price. The acceptance of the revised figure by the plaintiff is reflected in the e-mail dated 23 April 2012 from Teh Soo Chye to Yap Wai Ming (Re: p. 25 A1):

> Dear Wai Ming,
>
> Our client is agreeable on a goodwill basis and in principle to accept the increase in price from USD25.3m to USD27m (subject to final approval from board). However please elaborate on the mechanism by which your client intends to resolve the RPSL & Ngu's debt for our client's consideration ...
>
> Please let us have the Accounts as at 29.2.2012 which shall form the financial basis of the transaction (hence warranty that it is substantially true and accurate) and revert with your comments on the revised sale and purchase Agreement soonest possible ...

[40] Mr Yap Wai Ming responded *via* an e-mail dated 26 April 2012,

> Thank-you for the e-mail. My apologies for not reverting to you sooner as my client was unwell and had to return to Japan. As our client's proposal was only accepted after the cut-off period of noon, the offer has lapsed and my client would like to reconsider the proposed sale of the company to your clients. My client's instructions are that any new negotiations on the proposed sale will be based on fresh terms ... .

[41] Throughout the cross-examination PW5 gave evidence that he and Mr Sugiki, had at all times, agreed to the salient terms of the sale transaction at the time of signing of the Hong Kong MOU and that the intention of the sale transaction from the very beginning was to purchase the golf course. Despite the terms in the Hong Kong MOU which clearly stipulated that there shall be no further negotiation on the consideration price, the plaintiff was prepared to reconsider the new purchase price when the first defendant indicated that it wanted to revise the purchase price.

A **The Evidence Of PW2**

[42] Mr Teh Soo Chye ("PW2"), the advocate and solicitor was actively involved in the preparation and vetting of the SPA on behalf of the plaintiff. In his witness statement he stated that
B he was instructed to prepare the MOU sometime in 2011. His firm was retained to advise, negotiate and carry out the due diligence on the second defendant pursuant to the plaintiff's intention of purchasing the entire issued shares of the second defendant from the first defendant. He testified that he had received from
C Mr Sugiki on 19 March 2012 the PDF version of the first draft of the share purchase agreement three days after the Hong Kong MOU was executed (re: pp. 1-19 F). In the said draft the purchase price is stated as USD25.3 million as per the Hong Kong MOU.

D **[43]** In order to have a full appreciation of the discussions of the draft SPA that took place between the plaintiff's and the first defendant's solicitors, the e-mails exchanged between the solicitors was examined in detail by this court. By an e-mail dated 19 March 2012 sent at 2.29am, PW2 informed David Ong that
E the plaintiff have proceeded to redraft the SPA. However, the first defendant's solicitors did not revert with the soft copy of the draft. PW2 also stated that they were willing to incorporate some of the terms in the draft (Re: p. 12 F). Mr David Ong replied *via* an e-mail dated 19 March 2012 at 3.06am,
F

> We apologize for not being able to send you the soft copy and the soft copy was amended by clients and despite repeatedly asked clients to forward the same to you to me, they did not do so ... .

G **[44]** PW2 gave evidence that he received an e-mail from David Ong dated 19 March 2012 that the first defendant was not prepared to proceed with the SPA unless the SPA was executed on 23 March 2012 as stipulated in the Hong Kong MOU,

H From: David Ong [d-ong@dong-lawyers.com]

Sent: Monday, March 19, 2012 12:26 PM

To: 'SooChye'

I Cc: sugiki-k@docomo.ne.jp; 'Ronn Yong'; 'Marshall Lau'; eslimco@ gmail.com; yenlin@scth.com.my; Joanne.cheong@my.ey.com; Yoke-Lin.Lee@my.ey.com; 'Marshall Lau'; m-hashimoto@car.own.ne.jp; ks_sugiki@yahoo.co.jp

Subject: RE: Emailing: MINUTES OF MEETING (LF Poresia) Due Diligence dated 19.1.2012 (updated by EY).doc, MINUTES OF MEETING (LF Poresia) Due Diligence dated 3.2.2012 (updated by EY).doc

Dear Mr. Teh,

Please let us know your clients' position.

With respect to the proposed transaction, we been instructed to inform your clients that if the SPA cannot be concluded and signed by the 23rd, March 2012, the proposed transaction shall be aborted and our client is not prepared to proceed after the 23 March, 2012.

We therefore look forward to your draft which should incorporate the latest terms agreed by parties in writing by way of a MOU when they last met.

Please let us hear from you.

Regards,

David Ong.

[45] The first draft of the SPA prepared by PW2 can be found at pp. 20-80 Bundle A1.

[46] PW2 gave evidence that on the eve of the agreed date of execution of the SPA, the first defendant appointed a new solicitor. He received an e-mail dated 22 March 2012 from Yap Wai Ming ("DW3") of Messrs Stamford Law Corporation informing PW2 that he was the newly appointed solicitor handling the transaction and that David Ong was no longer in the picture. As the new solicitor for the first defendant, DW3 raised new issues relating to the contents of the draft SPA. In an e-mail dated 22 March 2012 at 10.19pm (Re: p. 70 C2) DW3 informed PW2 the following:

... I have just been instructed by NGU Co. Ltd (formerly known as Daiichi Shokai Co. Ltd.) to take over the conduct of the proposed sale and purchase of Resort Poresia Berhad from David Ong & Partners.

... I did not have the luxury of time to review the documents with my clients as I was only instructed this afternoon. In view of the scheduled meeting between our respective clients tomorrow in Singapore and with an expectation of signing at the meeting, I enclose my preliminary comments to the draft agreement ... .

[47] One cannot but wonder why on the eve of executing the SPA the first defendant decided to appoint new solicitors. Mr Sugiki ("DW1") in cross-examination explained the reason for doing so. He alleged that David Ong, a solicitor from Singapore was not competent to act for the first defendant as he was unfamiliar with the laws of Malaysia. David Ong, however, was not called as a witness by the defendants. This court is of the view that this was just a mere ruse by the first defendant to throw a spanner in the negotiations and delay the formalisation of the agreement.

[48] Despite the sudden change of solicitors on 23 March 2012, there were still active discussions on the draft SPA. There was no indication of any major comments neither was there any issue that the transaction did not include the land by the solicitor of the first defendant. PW2 met up with DW3 to discuss the terms of the SPA and to finalise any outstanding issues. By an e-mail dated 23 March 2012, DW3 informed PW2 of the meeting to discuss the revised draft and to incorporate further comments which he had missed out (re: p. 70 C2). The second revised draft of the SPA can be found at pp. 71-136 C2. The land involved was sold to the first defendant by a SPA dated 29 September 1990 (255 acres) and further agreements dated 13 March 1991 (9 acres). The total area of the land is 109.196 hectares (269.85 acres). The draft SPA contained terms with regards to the land (cl. 9 on specific warranties).

[49] Notwithstanding that the SPA was not executed on the date as agreed pursuant to the Hong Kong MOU, the two solicitors continued discussing the draft SPA as evidenced from the e-mails exchanged between the two lawyers. DW3 sent an e-mail dated 28 March 2012 to PW2 and raised further issues as follows:

(i) 50% of the fees collected as its commission;

(ii) Daiichi Shokai Co Ltd will set up a branch office in Singapore and open a bank account;

(iii) Vendor does not agree to the limitation period to three years;

(iv) Disclosure letter format; and

(v) Taxation claim.

[50] Another e-mail dated 30 March 2012 by DW2 was sent out to PW2 stating the first defendant's final response (Re: p. 162 C2).

[51] PW2 in his witness statement, stated that the two solicitors were sorting out the administrative issues relating to methods of payment and other ancillary issues. However, by an e-mail dated 9 April 2012 (Re: p. 82 A1) the first defendant requested for the consideration price of the share sale transaction to be reverted back to USD27 million as per the earlier MOU and gave the plaintiff a deadline until 10 April 2012 to respond. This was subsequently followed by another e-mail dated 19 April 2012 (Re: p. 274 C2) from DW3 which reads:

> From: Yap Wai Ming [waiming.yap@stamfordlaw.com.sg]
>
> Sent: Thursday, 19 April, 2012 5:21 PM
>
> To: SooChye
>
> Cc: lmeng@mulpha.com.my; ronn@mulpha.com.my; mlau@mulpha.com my; mai.uraga@yahoo.com; ks_sugiki@yahoo.co.jp; sugiki-k@docomo.ne.jp; m-hashimoto@car.ocn.ne.jp; k_makitaip@hot mail.com; Lisa Hui; Gina Ng Yiling; 'Eng Siang'
>
> Subject: RE:Poresia [SLC-ACTIVE.FID48157]
>
> Dear Soo Chye
>
> I have instructions from my clients as follows:
>
> 1. Our clients apologize for the mistaken perception on the treatment of the inter-company debts. The meeting in Hong Kong which culminated in the memorandum to reduce the purchase price by the set-off of the inter-company debts between RPSPL/NGU to RPB. After our clients had the benefit of consulting with their auditors, this intercompany debt will be resolved as follows:
>
>   a. RPB currently has more than RM49m in retained profits. RPB will declare an interim dividend of RM8m to NGU.
>
>   b. NGU will on-lend about RM7.5m to RPSPL.
>
>   c. RPSPL will use the RM7.5m to repay its debt to RPB.
>
>   d. NGU will use the balance RM0.5m to set off against the outstanding loan from RPB.

e. The net result is that a tripartite agreement will be signed between RPB, RPSPL and NGU to cancel these debts *via* the dividend payment.

2. While out clients recognize that this has the same effect of reducing the net asset value of RPB by the amount of the dividend declared, their understanding has always been that RPB is to be sold as it is for the value of US$27m. Our clients informed us that they have clarified this position to Mr Kameda.

3. On a without prejudice basis and subject to contract, our clients are prepared to maintain the offer at US$27m for acceptance up to noon on Monday 21 April 2012 based on the terms as set out in our earlier emails below subject to the changes to the cancellation of the inter-company loans described in para 1 above.

Best regards

Yap Wai Ming partner

Stamford Law Corporation.

[52] PW2 in his witness statement stated that the plaintiff had decided to consider the first defendant's request despite the failure to sign the SPA on 23 March 2012 as agreed pursuant to the Hong Kong MOU. According to PW2 it would not have been commercially sensible to take legal action without trying to settle the matter amicable. That is why the lawyers of both the plaintiff and the first defendant continued with the negotiations. From the e-mails exchanged between PW2 and DW3 the parties were rigorously discussing and amending the draft.

The Evidence Of DW1

[53] Kunihiko Makita ("DW1"), a retired Japanese diplomat and a friend of DW2 for more than 30 years. In his witness statement, he stated that in 2009 he was asked by DW2 to accompany him to Hong Kong to assist him in the negotiation as he did not understand English. The meeting was attended by PW5 and PW1. PW1 did most of the translations. Subsequently after the meeting in Hong Kong, he was asked by DW2 to revise Mr David Ong's draft so that it reflects the contents of the Hong Kong MOU. DW1 revised the draft and gave the draft to DW2.

[54] DW1 also attended the meeting on 23 March 2012 merely as an observer. In his witness statement, he said that DW2 informed him that he was not interested to negotiate further and one of the reasons as stated in the witness statement is that ". ... (iii) The purchase price offered by Mr. Lee Seng Huang for the purchase of Resort Poresia Bhd. was below market price, as the land owned by Resort Poresia has a higher market ..."

[55] This statement made by DW1 in his witness statement evidenced that the transaction included the land as the value of the shares is intricately linked to the value of the land.

The Evidence Of DW2

[56] Mr Sugiki or Sugiki San (DW2) is a director of the first defendant and does not read or understand English. Just like PW1 he gave evidence through a translator. PW1 translated the contents of the Hong Kong MOU to DW2 before he signed the document.

[57] In his witness statement, DW2 confirmed that the MOU was intended to be the basis for further discussions and negotiations. DW2 was acquainted with PW5's father and had on many previous occasions discussed and negotiated the purchase of Poresia Country Club. The focus was mainly on the membership of the club and the determination of the purchase price took into account the inter-company loan due from Poresia Singapore and borrowings by the second defendant. In his witness statement, he stated that PW5's father had indicated his interest to purchase the club about 15 years ago.

[58] DW2 stated in the witness statement that apart from items 3 and 5 of the MOU, the rest of the items remained unaltered and applicable. He admitted in the witness statement that the parties had understood that subsequent terms would be incorporated in the SPA by lawyers for further discussion and consideration before the execution.

[59] However, in cross-examination DW2 confirmed that he had agreed to the final price of the transaction to be USD25.3 million,

Q: And item no. 3 final price of the transaction is USD25.3 million?

A: Yes.

A Q: This is the figure which both you and Mr. Lee agreed?

A: Actually this is the figure I end up agreeing with much persuasion from Mr. Kameda and Mr. Lee.

Q: But you agreed?

B

A: Yes.

[60] According to Mr Sugiki the object of the agreement is the sale of shares of the second defendant. He gave evidence that it was the plaintiff that had delayed in proceeding with the due C diligence exercise. It is the evidence of DW2 that there is no valid and binding agreement for the purchase of shares under the Hong Kong MOU as a definitive agreement must be drawn up first and agreed to DW2 in his witness statement further stated that David Ong had drafted the original SPA. DW2 then passed the draft to D a friend, Mr Kunihiko Makita (DW1) to revise it in accordance to what was agreed in Hong Kong. The amended draft was then sent to his solicitor, Mr David Ong and the plaintiff's solicitor, Mr SC Teh. He then left it to the lawyers to fine tune the draft.

E **[61]** It is the evidence of DW2 that two days before the proposed signing of the SPA, Mr David Ong felt that he was not conversant in Malaysian law and requested the first defendant to appoint another firm of lawyers. DW2 gave evidence that Mr David Ong is a long time personal friend and could also speak F Japanese. DW2 admitted in evidence that Mr Ong had told him he was not conversant in Malaysian law from the very beginning of the discussion. Despite knowing that from the beginning, Mr David Ong only discharged himself a day before the expected date of executing the agreement.

G

[62] DW2 denied that he had refused to execute the SPA. The reason he said was because PW2's first draft was only forwarded to Mr David Ong on 21 March 2012. However, based on the correspondence DW2 only forwarded the draft to the lawyers on H 17 March 2012 after DW2's friend Mr Makita (DW1) had looked through it. Based on the series of e-mails as well as the testimony of the witnesses, PW2 vetted the draft accordingly but the change of solicitors by the first defendant delayed the process as the new solicitor would have to go through and familiarised himself with the I terms and conditions of the SPA. Unfortunately, the first defendant did not call Mr David Ong as a witness to confirm what had transpired and if he is not conversant or familiar with Malaysian laws.

[63] The reason given by DW2 for not executing the SPA was the treatment of the inter-company loan in Hong Kong because according to the accountants, instead of Resort Poresia (Singapore) Ltd., owing the second defendant, it was the second defendant that owed a sum of RM4.5 million to the first defendant.

[64] It is the evidence of DW2 that the first defendant had only agreed to sell the shares of the second defendant to the plaintiff and that there was never an intention to sell the land. Based on the contemporaneous documents, I find that the intention of the parties, in particular PW5 and DW2 is the sale and purchase of the shares together with the land.

The Evidence Of DW3

[65] DW3, Yap Wai Ming, was the solicitor appointed by the first defendant on the eve of the date of formalising the SPA. He is Singapore – based lawyer and a partner in a Singaporean law firm of Stamford Law Corporation. He was at one point of time practising in Malaysia and was with the firm of Messrs Abdul Raman Saad & Associates and Tay & Partners. Messrs Abdul Raman Saad & Associates also dealt with the transaction with the third defendant.

[66] DW3 stated that he has known Sugiki San for more than 15 years and when he was with Messrs Abdul Raman Saad & Associates, he was involved in the initial sale transaction of the land when it was first purchased by Sugiki from the plaintiff.

[67] In his WS, DW3 said he was contacted by Sugiki through his Singapore office on 22 March 2012. He had communicated *via* Sugiki's assistant, Ms. Mai Uraga (Mai). He was told that the first defendant's lawyer, Mr David Ong, was not familiar with Malaysian law therefore they requested that DW3 takes over conduct of the matter and the negotiations.

[68] In coming to a decision in this case, the court has carefully perused the evidence of the witnesses of each party as well as the documentary exhibits relied upon by them to prove their case. The court has also been greatly assisted by the written submissions filed by both parties.

[69] In *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232 the Court of Appeal held:

> ... when there is an offer and an acceptance of that offer, an agreement is in existence and the court will enforce it. In simple contracts the agreement must be supported by consideration to establish the obligation. The parties too must intend the agreement to have legal force because the courts will only enforce what the parties intend should be enforced. The parties must also agree that their agreement must be mutual. And the parties must also be legally capable of reaching a binding agreement and, finally, the subject matter of their agreement must be legal.
>
> In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts ... .

[70] In the Court of Appeal's case of *Karumalay Varniyan & Anor v. Ananthan Rethinam* [2005] 2 CLJ 429 where it was held as follows:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for, good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach of judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

[71] The court has carefully examined and perused the 2011 MOU, the Hong Kong MOU, the draft agreements as well as the e-mail correspondences between the parties. Based on the evidence, both oral and documentary, the intention of the parties

are patently obvious and had been formally reduced into writing through the Hong Kong MOU dated 16 March 2013. The golf course is the only asset of the second defendant. The parties had, in no uncertain terms, agreed to purchase and sell the entire issued shares of the second defendant. The land involved was specifically identified in the MOU as well as in the draft SPA prepared and vetted by the solicitors of the plaintiff and the first defendant with the knowledge of Mr Sugiki. There was definitely *consensus ad idem* as to the subject matter and the agreed purchase price consideration. It is also stated in clear terms in the Hong Kong MOU that the "final price of the transaction is US25.3 million. No more negotiation on the price."

[72] The draft agreement is based on the Hong Kong MOU wherein the core subject matter of the transaction remaining the same. The MOU, in my assessment therefore, embodied a contract made on valuable consideration, the terms of which imposed an obligation on the first defendant to sell the shares to the plaintiff to purchase. The draft SPA was discussed and vetted by the solicitors of the first defendant and the plaintiff. DW1 in his witness statement gave evidence that the purchase price offered by PW5 for the purchase of Resort Poresia Bhd. was below market price, as the land owned by Resort Poresia has a higher market. The lawyers for both the plaintiff and the first defendant also discussed issues related to quit rent and assessment. In DW3's witness statement, he stated that the proposal to cover all the property quit rent and assessment for year of assessment 2012 was rejected as the first defendant felt that the purchase consideration offered was heavily discounted and it would be a further attempt at reducing the purchase price if it had to bear the additional cost of property quit rent or assessment. This is a clear indication that the transaction included the sale of the said land.

[73] It is the submission of the defendants that the MOUs are non-binding until a definitive agreement is executed as stipulated in cl. 14 of the 2011 MOU. It is submitted by the defendants that since the definitive agreement was not executed, there was therefore no concluded contract between the parties. Clause 14 also expressly stipulated that cls. 11 (Confidentiality), 12 (Fees and Expenses), 13 (Governing Law, Dispute Resolution and Arbitration) and 14 (Binding Provisions) are however binding.

[74] The Court of Appeal in *Sandrifarm Sdn. Bhd v. Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313, said:

> There are two issues to be decided. First and more importantly, whether a valid contract has been formed between the parties even though a valid sale and purchase agreement had not been executed yet. Secondly whether it is justifiable to refuse the appellant the reliefs sought for.
>
> In the circumstances of this case, we find no difficulty in holding that a valid enforceable contract had materialised between the parties. The offer to sell was made by the respondent and this offer was accepted by the appellant. In accordance with the terms of the sale, the appellant remitted the 10% deposit amounting to RM190,000 which amount was duly received by the respondent and they issued a receipt for it. Therefore, a valid enforceable contract had been formed. The parties have been identified, the property, the price and the terms too have been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement.

[75] The Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 AMR 3533 reaffirmed principle that the law leans in favour of upholding bargains and not in striking them down willy-nilly. *Charles Grenier* was a case where it was contended that there was an 'Agreement to make an Agreement' and this was to be deduced from the contents of relevant correspondence passing between the parties involved. Gopal Sri Ram JCA (as His Lordship then was) speaking however, for the Federal Court there stated:

> We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

[76] I am mindful that it is expressly provided in the 2011 MOU that the MOU "... does not constitute an offer or commitment by the parties hereto and is intended to serve as a basis for definitive agreement only ..." and " ... The terms and conditions stated in this MOU are not intended to be and shall not constitute legally binding obligations unless specifically provided for herein ..." the conduct of the parties shows otherwise, that is, an intention to create a legal and binding relation. The Hong Kong MOU which

was signed after the 2011 MOU did not state specifically at all that the terms were not binding. Item 3 of the Hong Kong MOU specifically provides that the final price of the transaction is USD25.3 million and that there will be no more negotiation on the price. The plaintiff was at all material time ready to proceed with the execution of the SPA. It was only on the eve of the signing of the SPA that the plaintiff was notified through the first defendant's new solicitor Yap Wai Ming that he was appointed to take over from Mr David Ong.

[77] In this instant case, there was a meeting of minds between the parties. There was consideration, certainty of parties, certainty of the price and certainty of property. Although the terms and conditions of the agreement are not embodied in a formal contract, a valid and binding agreement had been concluded between the parties.

[78] The conduct of the parties shows an intention to create a legal and binding relation. Mr Sugiki may not be fluent or understand English but he is a shrewd businessman and the sole architect of this transaction. Kameda (PW1) was present at the negotiations between Mr Sugiki and Mr Lee and confirmed that the parties had intended to enter into a agreement.

[79] Mr Teh Soo Chye (PW2), the plaintiff's lawyer was retained to advise, negotiate and also carry out the due diligence on the second defendant pursuant to the plaintiff's intention of purchasing the entire issued shares of the second defendant from the first defendant. Mr David Ong was the first defendant's solicitor and was involved in the negotiating, vetting of the agreement. However, it was only on the eve of the date agreed upon that a new solicitor took over as Mr David Ong, a Singapore – qualified lawyer is said not to be familiar with Malaysian law. Mr David Ong however, was not called by the first defendant as a witness.

[80] Based on the all the contemporaneous documents the intention of the parties were patently obvious. The land involved was specifically identified and there was also *consensus ad idem* as to the agreed purchase price consideration. This is evidenced by the 2011 MOU which had described the subject matter as all the shares of Resort Poresia Berhad who is the owner of Poresia Country Club located at Tanjung Kupang, Gelang Patah Johor

Bahru (including the land duly registered free from encumbrances and all movables assets) with 1,248 active members, 1,522 sleeping members, 2,883 cancelled members and 262 term members.

[81] Mohamed Dzaiddin FCJ (as His Lordship then was) approved and adopted the *dictum* of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at p. 288 in *Lim Chia Min v. Chean Sang Ngeow & Anor* [1997] 2 CLJ 337, as follows:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal documents may be ignored.

[82] In *Cipta Cermat Sdn. Bhd. v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746, the Court of Appeal held that:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and certainty of property. Also, there were the unequivocal acts of part performance by the plaintiff which were referable to an existing contract between the parties. The acts of part performance in the present case were the payment of the deposit coupled with the RM5,000 meant for the squatters. Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document. The defendant's argument that this was a case where the execution of the formal written agreement was a condition precedent to there being a contract was unacceptable. The defendant's own evidence that the defendant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties pointed to the formal agreement being an unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract and the written agreement was a mere formality ... .

[83] Similarly, in the instant case, the plaintiff and the first defendant had drawn up the Hong Kong MOU specifying the essential terms. There was clearly an offer to sell by the first defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and certainty of property (the shares and the golf course). There were continuous discussions between the parties with the intention to enter into a formal agreement based on the terms of the MOUs. The Federal Court in *Ho Kam Phaw v. Fam Sin Nin* [2000] 3 CLJ 1 FC held that in law, there was already a concluded contract when the plaintiff approved the draft. In the instant case before this court there was not only *consensus ad idem* between the parties but the necessary *animus contrahendi.*

[84] Therefore, from my perusal of the evidence before me, especially the MOUs, e-mails, the draft SPA, and the written submissions of the parties, I find that the MOUs executed between the plaintiff and the first defendant is a concluded and binding contract between the parties.

The First And/Or Second Defendant's Mala Fide Conduct

[85] It is the submission of the learned counsel for the plaintiff that even after the signing of the third defendant's SPA and collecting the deposit sum of RM7,840,800 on 11 September 2012, Mr Sugiki who is the common director of the first and second defendants had tried to negotiate the sale of the land to other parties. He was after all at the material time president and representative director of the first defendant as well as a director of the second defendant. Sugiki was also the person who led the discussions on behalf of the first and second defendants in relation to the share sale agreement.

[86] On 8 November 2012, approximately two months after the signing of the third defendant's SPA, Kameda (PW1), the intermediary, dealing with both the plaintiff and the first and second defendants, received an email from Suguki who offered the sale of the land and buildings of the second defendant (together with the golf club members) to the plaintiff for Japanese Yen 3000 million (equivalent to approximately USD37.5 million),

> ... Mr Sugiki said following in his mail: (The message is written in the title column.) Qte

A There were many things on the way to here. Now I can confer (with the party) (about the Poresia Deal), if it (the deal) is (a deal of) sale and purchase of the land and building, member included, price is three billion Japanese yen (or Japanese Yen 3,000million).

If you compare the market price at nearby location, I think that
B is cheap.

Give me answer. Sale and purchase of the share (or stock) is not considered.

Best regards,
C

Unqte

For your better understanding, I am sending another mail in which I attach his mail in Japanese. I don't know your side can receive it or not.
D

Best,

Kameda (F.Y.I.: The price agreed on March 16, 2012 was US$25.3 JY3,000 million divided by 80 (US$1 = 80) is US$37.5 million.) ...
E

[87] Therefore, it is submitted by the plaintiff given that the third defendant's SPA has already been executed when Sugiki offered to sell the land and buildings of the second defendant (together with the golf club members) to the plaintiff for Japanese
F Yen 3000 million, this clearly shows bad faith on the part of the president of the first defendant and director of the second defendant. By his conduct Sugiki was willing to absolve the first and/or second defendant or any agreement in respect of the sale and purchase of the land already agreed where a better deal could
G be procured.

[88] Based on the documentary and oral evidence the parties had, until the eve of the scheduled signing date, proceeded on the understanding and basis that the SPA will be signed on 23 March
H 2012. The seven issues were raised after the new solicitor took over on 22 March 2012, a day before the agreed date of signing. I am in agreement with the learned counsel for the plaintiff that the last minute change of solicitor shows the first defendant's bad faith in the whole transaction.

I

[89] According to Sugiki the change of solicitors was necessary as Mr David Ong was totally unfamiliar with Malaysian law. However, the first defendant had also appointed Messrs Hisham, Chong & Co to assist and to advise on the transaction. From the series of e-mails exchanged between the solicitors, Mr David Ong had worked together with Messrs Hisham, Chong & Co for the purposes of the transaction. In fact the first draft was prepared by the said firm.

[90] The first defendant had indicated *via* e-mails dated 7 April 2012 and 9 February 2012 for the consideration price to be increased to USD27 million due to mistakes in accounts. However, no accountants were called by the first and/or the second defendant as witnesses to support the allegation of mistakes in the account to justify the increase in price.

[91] On evidence, the change in solicitor on the eve of the scheduled signing and the increase in price is irrefutably suspicious and tainted with *mala fide* with the clear intention of depriving the plaintiff of the valuable asset, the shares and the land.

Specific Performance

[92] The plaintiff seeks specific performance from the defendants for the failure to formalise the SPA. The Specific Relief Act, 1950 (Act 137) confers on the court a discretion to order specific performance against a contracting party to perform an obligation that it has undertaken to perform under the contract. The exercise of this discretionary power was explained in detail in the Court of Appeal case of *MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd* [2010] 1 CLJ 36; [2010] 5 MLJ 71 where Abdul Malik Ishak, JCA said:

> An order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is an equitable remedy. It cannot be asked for as of right. It is certainly a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercise of the discretion is always governed by fixed rules and principles (*Caesar Lamare v. Thomas Dixon* (1873) LR 6 HL 414 at p 423).

[93] The party seeking specific performance must show to the satisfaction of the court that he is ever ready and willing to perform the contract. Seah FJ in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 spoke of the need of the plaintiff to be in a state of 'continuous readiness and

willingness, ... to perform the contract'. Section 23(b) of the Specific Relief Act 1950 (Act 137) bars specific performance of a contract in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed.

[94] Section 18 of the said Act provides the court with powers to order 'compensation' *in lieu* of an order for specific performance in appropriate situations. The pertinent provisions of that section are reproduced below:

> ... Section 18(1)
>
> Any person suing for the specific performance of a Contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> Section 18(2)
>
> If in any such suit the court decides that specific performance ought not to be granted, but that there is a Contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> Section 18(3)...
>
> Section 18(4)
>
> Compensation awarded under this section may be assessed in such a manner as the court may direct.
>
> Section 18(5)
>
> The circumstance that the Contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section ... .

[95] In the particular circumstances surrounding the transaction, I hold that the plaintiff is entitled to an order for compensation to be recovered from the first and second defendants for the breach by the first defendant of the terms of the MOU. However, due to the existence of the SPA between the first defendant and the third defendant, specific performance may not be appropriate in this case such that the alternative claim will be allowed. It is my finding therefore that the compensation recoverable by the plaintiff from the first defendant *in lieu* of an order of specific performance in this case is the sum of RM841,691.94 being expenditure incurred.

Conspiracy To Injure And/Or Defraud The Plaintiff

[96] It is the submission of the plaintiff that on or before July 2012, the first, second and third defendants and/or first and third defendants and/or second defendant and third defendant by the execution of the option to purchase on 25 July 2012 and the further execution of a SPA on 11 September 2012 for the sale and purchase of the land in question had conspired and combined together wrongfully and with the sole or predominant intention of:

(a) Injuring the plaintiff; and/or

(b) Defrauding the plaintiff; and/or

(c) Causing to frustrate the HK Memorandum between the plaintiff and the first defendant; and/or

(d) Causing to deprive the object of the HK Memorandum and/or the fruits of the present proceedings from the plaintiff.

[97] It is further submitted that the second and third defendants had negotiated for the sale and purchase of part of the land despite having full knowledge of the plaintiff's interest in the land. It is further submitted that the first and second defendants executed an option to purchase and further executed a SPA despite having full knowledge of the plaintiff's interest in the land.

[98] It is submitted by the learned counsel for the plaintiff that the third defendant's SPA is peculiar as the vendor will have to not only refund the deposit sum if the conditions precedent is not met, but also all monies paid under the SPA including reimbursable expenses and interest of the same at 6% per annum.

[99] Therefore, it is submitted that as a result of the defendants' conspiracy to injure and/or defraud as set out in paras. 47-48 above, the plaintiff stands to and/or has suffered loss and damage in the form of damages in respect of any breach arising out of the third defendant's SPA and/or non-compliance of the terms of the same.

[100] In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff. Mohamed Dzaiddin J (as he then was) in *Yap JH v. Tan Sri Loh*

Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 referred to the case of *Lonrho Plc v. Fayed and Others* [1991] 3 All ER 303 where House of Lords affirmed that there are two types of conspiracies:

> .. (a) A and B combine to do an lawful act for an unlawful purpose which causes loss to a third party, C; and
>
> (a) A and B combine to do an unlawful act which causes loss to C ... .

[101] Applying the above principles where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be conspiracy. If the predominant purpose is for the self-interest or protection of the defendants, it is not an unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss.

[102] In *Rookes v. Barnard* [1964] 1 All ER 367 at p. 397 Lord Devlin said:

> There are, as is well known, two sorts of conspiracies, the *Quinn v. Leathem* ([1901] AC 495 ...) type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.

[103] In *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] AC 435 at p. 445 Viscount Simon LC said:

> It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another person and damages results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it cause damage ... .

[104] Therefore, for conspiracy to take place, there must be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. There must also be a co-existence of an agreement with an overt act causing damage to the plaintiff. Hence, this tortious act is complete only if the agreement is carried into effect, thereby causing damage to the plaintiff. For conspiracy to take place, there must also be an unlawful object,

or, if not in itself unlawful, it must be brought about by unlawful means. In order to succeed in a claim based on the tort of conspiracy, the plaintiff must establish:

(a) An agreement between two or more persons;

(b) For the purpose of injuring the plaintiff; and

(c) The execution of that agreement resulted in damages to the plaintiff.

[105] As enunciated in the cases mentioned above, there must be evidence of an agreement to cause damage. For this purpose, a close look at the evidence tendered to determine the intention of the parties is required. The facts may have seem to give the impression that there was a conspiracy to defraud. However, the court must thoroughly sieve the facts to ensure that those facts satisfy the principles laid out above. This court finds that the evidence adduced is insufficient to constitute an act of conspiracy. This was simply a case of a shrewd businessman, Mr Sugiki who wanted to maximise his profits. There was no evidence to show predetermined collusion between the first, second and third defendants.

[106] I find that there is no evidence to suggest that there is any conspiracy by the first and second defendants with the third defendant to defraud the plaintiff D1.

Whether The Third Defendant's SPA Is A Sham And/Or Was Entered Into For A Collateral Purpose

[107] It is the submission of the plaintiff that the third defendant on its own volition caused a sham SPA to be entered into between itself and the second defendant. The third defendant's SPA was intended to cloak the third defendant's intention to frustrate, scuttle and deprive the plaintiff of the object of the Hong Kong Memorandum and/or the fruits of the present suit and that it is not a coincidence that the third defendant does not stand to lose anything from the third defendant's SPA. The third defendant's SPA was designed to injure the plaintiff.

[108] Quay Chew Keong (DW7), a director of the third defendant, gave evidence that his first contact with the second defendant was sometime in May 2012. He was introduced to the representatives of the second defendant by a Peter Fong who happened to be the auditor of the second defendant. Peter Fong

told him that the second defendant was looking for potential buyers or joint venture partners for its lands. Informal discussions were held with Mr Sugiki and Mr Hashimoto which ultimately led to an offer by Mr Sugiki sometime in early July 2012. The option to purchase was executed on 25 July 2012.

[109] From the evidence adduced, the third defendant was keen to purchase and develop the land. I am of the considered view that on the evidence adduced the third defendant's transaction with the first defendant is not a sham transaction. There was proper negotiations and consideration between the parties. Having heard the oral testimony and having considered the documentary evidence offered, I am not convinced that the transaction with the third defendant is a sham as alleged.

Conclusion

[110] Based on the reasons mentioned above, I am satisfied that the plaintiff has proved its case on a balance of probability against the first defendant and is entitled to the relief sought,

(a) Damages *in lieu* of specific performance to be assessed;

(b) The sum of RM841,691.94 (Ringgit Malaysia: Eight Hundred Forty-One Thousand Six Hundred Ninety-One and Sen Ninety-Four) as expenditure incurred by the plaintiff in this transaction; and

(c) Cost of RM50,000 (Ringgit Malaysia: Fifty Thousand).

[111] However, the plaintiff's claim against the second defendant is dismissed with cost of RM50,000 (Ringgit Malaysia: Fifty Thousand) to be paid by the plaintiff to the second defendant. For the reasons above, the plaintiff's claim against the third defendant is dismissed and the counterclaim of the third defendant is allowed. Accordingly I made the following orders,

(a) A declaration is hereby given that the Hong Kong Memorandum does not give rise to a legal interest in a part of the land held under (HS(D) 195059, PTD 59410, PTD 5949, in the Mukim of Pulai district of Johor Bahru, in the State of Johor) measuring approximately 104 acres (from the whole 166 acres therein) ("land") and that the plaintiff has a caveatable interest in the said land.

(b) The Registrar of Titles be directed to remove Private Caveat No. 18130/2012 dated 30 May 2012 entered against the walker land;

(c) Damages to be assessed;

(d) Costs of RM50,000 (Ringgit Malaysia: Fifty Thousand) to be paid by the plaintiff to the third defendant;

[112] The injunction dated 7 November 2012 pursuant to the plaintiff's notice of application in encl. 11 is discharged. The order for *Mareva* injunction dated the 21 March 2013 to the plaintiff's notice of application in encl. 72 (as amended in the Court of Appeal Order dated 21 August 2013 in Civil Appeal No. W-02 (IM)(NCC)-988-04-2013) is discharged and the plaintiff to pay costs of RM3,000 (Ringgit Malaysia: Three Thousand) to the second defendant.